IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1081

DONALD LEE DAWSON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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The Petitioner, Donald Lee Dawson, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered in this proceeding on August 2, 1978.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland was a per curiam opinion, not officially reported, and is contained in Appendix A (*infra*).

JURISDICTION

The opinion of the Court of Special Appeals of Maryland was filed on August 2, 1978. A timely petition to the Court of Appeals of Maryland for a writ of certiorari was denied on October 9, 1978. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHAT TYPE OF COURT ORDER AND WHAT STANDARD OF PROBABLE CAUSE ARE REQUIRED FOR THE EX PARTE INSTALLATION OF A DIALED NUMBER RECORDER (PEN REGISTER) ON AN INDIVIDUAL'S TELEPHONE LINE BY THE STATE?

II.

WHAT IS STATUTORILY MANDATED BY 18 U.S.C. §2518(1)(c) WITH RESPECT TO A FULL AND COMPLETE DISCLOSURE OF OTHER INVESTIGATIVE TECHNIQUES?

III.

WHETHER A DEFENDANT IS DENIED EQUAL PROTECTION WHEN HE IS PLACED ON PROBATION AND TOLD THAT IF HE DOES NOT PAY A $50,000 FINE HIS PROBATION WILL BE REVOKED AND HE WILL BE SENTENCED TO TEN YEARS IN JAIL?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

. . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In April, 1975 the Prince George's County Police Department made an ex parte application to a Judge of the District Court of Maryland (a court of limited jurisdiction) for an order authorizing the installation of a dialed number

recorder to Petitioner Dawson's telephone lines. The ex parte order was signed and pursuant to that order the Prince George's County Police did attach a dialed number recorder to Dawson's telephone lines on three separate occasions. The attachment was made on a line leased by Prince George's Police Department between Dawson's house and the telephone company switching station. At the conclusion of the three attachments a return was made to a District Court Judge. Dawson was not then notified of the order, the attachment, or the return.

Thereafter in May of 1975, the State's Attorney for Prince George's County, Maryland petitioned a Judge of the Circuit Court for Prince George's County, Maryland (a court of general jurisdiction) for an ex parte order authorizing the interception of telephonic communications over Dawson's telephone lines. The order was signed and communications were intercepted over Dawson's telephone lines for nine days. The petition for interception contained the information gathered from the pen register. At the conclusion of the wiretap a return was made to a Circuit Court Judge.

Thereafter the Prince George's County police executed a search warrant issued on the basis of evidence gathered by the pen register and wiretap at Dawson's residence and seized certain evidence.

As a result of the information obtained from the pen register, the wiretap, and the search warrant, Dawson was charged with twenty violations of the Maryland gambling laws. Md. Ann. Code Art. 27, §356, 357, 360 and 366. Before the case came on for trial, Dawson filed a timely Motion to Suppress all evidence in the case alleging *inter alia*: that the installation of a dialed number recorder by the

State to his telephone lines was a Fourth Amendment intrusion and that the court order which authorized its installation was not based upon probable cause and was not a proper search warrant under Maryland law. Dawson also argued that there was not a full and complete disclosure of other investigative techniques.

The Court denied Dawson's Motion to Suppress Evidence and at the subsequent trial Dawson was found guilty of all charges. Dawson was sentenced to ten years in jail and a fine of $50,000. The sentence with respect to the incarceration was suspended and Dawson was placed on five years active probation with the special condition that if the fine was not paid within 90 days the probation would be violated and he would be incarcerated.

Dawson appealed his conviction to the Court of Special Appeals of Maryland alleging that the installation of a dialed number recorder by the State to his telephone lines was an invalid Fourth Amendment intrusion and that said installation was done without sufficient probable cause and without a proper Court order; that there was not a full and complete statement of other investigative techniques as required by 18 U.S.C. §2518(1)(c), and that his sentence was illegal.

The Maryland Court of Special Appeals ruled that Maryland's highest court, the Court of Appeals of Maryland, had decided that a pen register was not a Fourth Amendment intrusion in the case of *Smith v. State*, 283 Md. 156, 389 A.2d 858 (1978),[1] and declined to address

[1]This Court granted a petition for writ of certiorari in the Smith case on Monday, December 4, 1978 (No. 78-5374, Smith, Michael Lee v. Maryland).

Dawson's pen register issue. The Court of Special Appeals also ruled that there was a sufficiently full and complete statement of investigative techniques and that Dawson's sentence was proper.

A timely Petition for Writ of Certiorari was filed with the Court of Appeals of Maryland addressing all issues and was denied by that Court on October 9, 1978.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THIS COURT SHOULD DECIDE WHAT TYPE OF COURT ORDER AND WHAT STANDARD OF PROBABLE CAUSE ARE REQUIRED FOR THE EX PARTE INSTALLATION OF A DIALED NUMBER RECORDER (PEN REGISTER) ON AN INDIVIDUAL'S TELEPHONE LINE BY THE STATE.

By order of Court dated Monday, December 4, 1978, this Court granted a writ of certiorari in the case of *Michael Lee Smith v. State of Maryland* (No. 78-5374) which addressed the question: "Does the installation of a pen register or touch tone decoder without a court order or search warrant violate the Fourth Amendment to the Constitution of the United States?"

The instant case presents the same issue but in a different, and Petitioner submits, complimentary fashion. In the instant case a pen register was attached to the Petitioner's telephone line, not at the phone company's switching station as in *Smith supra*, but on a leased line

between the phone company's switching station and the Petitioner's residence. In addition, the State in the instant case had a court order based upon a probable cause application which authorized the attachment of a dialed number recorder.

The Petitioner argued below that since the Court order authorizing the attachment of a dialed number recorder was issued by a Judge of the District Court of Maryland (a Court of limited jurisdiction) then the Court order could only be a search warrant (because a Judge of the District Court of Maryland does not have the power to issue an extraordinary writ, Md. Ann. Code Art. 27 §594D). Petitioner also argued that there was insufficient probable cause for the issuance of the court order.

This case squarely presents two issues which are complimentary to the issue presented in *Smith supra* and which were left open in the case of *United States v. New York Telephone Co.*, 434 U.S. 159 (1978).

One, what is the nature of the court order that is required for the installation of a dialed number recorder. Is it a search warrant, is it an extraordinary writ, or is it a hybrid? The order in the instant case could only be a search warrant under Maryland law because the District Court of Maryland does not have the power to issue an extraordinary writ. Md. Ann. Code Art. 27 §594D. It can only issue search warrants. Md. Ann. Code Art 27 §551. If the instant court order is a search warrant it was clearly improper, for substantial non-compliance with Art. 27 §551 *supra*.

Two, what standard of probable cause is required for the installation of a dialed number recorder? Is a lesser standard of probable cause required because it may be a

less grevious Fourth Amendment intrusion? Petitioner submits a lesser standard is improper, but the issue is squarely presented here.

This court should issue a writ of certiorari in this case to decide what standard of probable cause and what type of court order are required for the ex parte installation of a pen register by the State.

ARGUMENT II

THIS COURT SHOULD DECIDE WHAT IS STATUTORILY MANDATED BY 18 U.S.C. §2518(1)(c) WITH RESPECT TO A FULL AND COMPLETE DISCLOSURE OF OTHER INVESTIGATIVE TECHNIQUES.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2518(1)(c)) requires that:

> Each application for an order authorizing . . . the interception of a wire or oral communication...shall include a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous.
>
> The legislative history of this provision states:
>
> This requirement is patterned after traditional search warrant practice . . . Normal investigative procedures would include standard visual or oral surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, search warrants... Senate Judiciary Report 1097, 90th Congress 2nd Edition page 101.

This court had occasion to briefly review this section in *United States v. Giordano*, 416 U.S. 505, at 515 (1974) where it stated:

> Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and of its clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surrepticious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigations. Rather, the applicant must state, and the court must find that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous. Citing 2518(1)(c) and (3)(c).

However, this general statement has not been clarified by this court and there is a need for this court to outline in detail the exact standard that is required under 18 U.S.C. §2518(1)(c). Various Circuit and District Courts have adopted conflicting positions with respect to what is required by this section.

Some courts have held that 18 U.S.C. §2518(1)(c) requires mere substantial compliance and only a de minimus showing. *United States v. Spagnulo*, 549 F.2d 705, 710 (9th Cir. 1977); *United States v. Matya*, 541 F.2d 741, 745 (8th Cir. 1977); *United States v. Steinberg*, 525 F.2d 1126, 1130 (2nd Cir. 1975); *United States v. Armocida*, 515 F.2d 29, 37-38 (3rd Cir. 1975).

Other courts have held that in light of this Court's language in *Giordano, supra* more than mere rote recitation of boilerplate language is required. *United States v. Abascal*, 564 F.2d 821, 826 (9th Cir. 1977); *United States v. Kalustian*, 529 F.2d 585, 589 (9th Cir. 1975); *United*

States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975); *United States v. Curreri*, 388 F. Supp. 607, 620 (D. Md. 1974); *United States v. Lanza*, 356 F. Supp. 27, 30 (M.D. Fla. 1973).

The questions presented by the various Circuits and which need to be addressed by this Court are: One, must the Government in fact exhaust every other investigative technique before it resorts to a wiretap. Two, if the Government must not in fact exhaust every investigative technique, must it inform the issuing Magistrate why those other investigative techniques would not be successful if attempted. Third, what in fact must be told to the issuing Magistrate with respect to the exhaustion of other investigative techniques. Four, must all conceivable investigative techniques be covered or must merely a few general investigative techniques be in the affidavit and application.

These significant questions of statutory interpretation have not heretofore been decided by this court and the Circuit and State courts are in disagreement over the exact statutory thrust of this section.

The affidavit in the instant case contained a thorough discussion of the petitioner's prior activities involving illegal gambling. This thorough discussion of petitioner's prior activities was contained in that section of the supporting affidavit which discussed probable cause. All of the petitioner's prior activities and convictions involving gambling were obtained as a result of search warrants.

However, in that section of the affidavit which discussed the exhaustion of other investigative techniques, the affiant boldly asserted that a search warrant would not be successful. This, despite the fact that the affidavit itself states

that search warrants had been successful involving the petitioner in the past.

This case squarely presents the exhaustion of other investigative techniques issue and thus this court should grant a writ of certiorari in this case to construe the impact and the meaning of 18 U.S. Code, §2518 (1)(c).

ARGUMENT III

THIS COURT SHOULD DECIDE WHETHER A DEFENDANT IS DENIED EQUAL PROTECTION WHEN HE IS PLACED ON PROBATION AND TOLD THAT IF HE DOES NOT PAY A $50,000 FINE HIS PROBATION WILL BE REVOKED AND HE WILL BE SENTENCED TO TEN YEARS IN JAIL.

Petitioner in the instant case was sentenced to ten years in jail and fined $50,000. The ten year jail sentence was suspended and the Petitioner was placed on five years active probation with the special condition that if he did not pay the $50,000 fine within 90 days his probation would be considered violated and he would be incarcerated for ten years.

This case presents the issue of whether there is a violation of equal protection when a Court, having found that a person is a likely candidate for probation and places that person on probation then determines that the person's financial status is a valid grounds for violating that probation. In essence, the court in the instant case made a finding of a probation violation prior to any actual violation occurring. Thus notwithstanding the Petitioner's valid showing of his

inability to pay the fine, his probation would none-the-less be considered violated.

This issue was presented to this Court in a different manner in the case of *Hunter v. Dean* (No. 77-6248 decided on December 11, 1978) and *Hopper v. Barnett* (No. 77-477 also decided December 11, 1978).

This court having let stand the decision in *Hunter v. Dean,* which allowed the violation of probation for failure to pay a fine, and having vacated the sentence in *Hopper v. Barnett,* in which a person was incarcerated because of his inability to pay a fine and probation was revoked, should determine the exact thrust of the equal protection clause in this area and clear up the ambiguity left after *Hunter, supra* and *Hopper, supra.*

CONCLUSION

For the reasons heretofore cited, and in reliance upon legal authorities hereinabove set forth, it is respectfully submitted that a writ of certiorari to the Court of Special Appeals of Maryland be issued herein.

Respectfully submitted,

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APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 1010

September Term, 1977

DONALD LEE DAWSON
V.
STATE OF MARYLAND

Lowe,
Melvin,
MacDaniel,
JJ.

PER CURIAM

Filed: August 2, 1978

PER CURIAM

Judge Robert J. Wood of the Circuit Court for Prince George's County convicted Donald Lee Dawson of numerous gambling violations, sentencing him to 10 years in jail (which was suspended) and a $50,000 fine. His appeal centers primarily upon the admissibility of evidence obtained as a result of telephonic interceptions.

All of the admitted evidence here challenged derived from information obtained through the use of a pen register. A pen register is a device attached to a telephone line, usually controlled at a central facility which records on paper tape all numbers of all telephones dialed from that line, and registers the fact that calls are made to the telephone. It does not monitor telephone conversations. *United States v. Giordano,* 416 U.S. 505, 549, n. 1 (Powell, J., concurring in part, dissenting in part).

The judicial authorization for the attachment of the pen register, which is the initial focus of appellant's challenge here, followed in the wake of an investigation into possible gambling operations in Prince George's County. It was the opinion of county police officers, who had been keeping appellant under intermittent surveillance, that appellant was conducting the suspected illegal operations from his home, primarily through the utilization of two unlisted telephones. When the printout from the pen register confirmed the investigators' suspicions, at least to the extent that inordinate use was being made of appellant's phones, a wiretap order was sought and obtained. The fruits of this wiretap subsequently served as the basis for the issuance of a warrant to search appellant's residence, and were admitted in evidence at the trial of appellant on the charges stemming from the investigation. It is the denial of his motions to suppress this evidence that appellant maintains was erroneous.

- the pen register order -

In his first two arguments, appellant contends alternatively that the district court lacked authority to issue the pen register order, as it was an extraordinary writ, and that the

order was an invalid search warrant, failing to meet the standards of compliance outlined in the Maryland Code. Md. Code, Art. 27, §551; Md. Rule 780 (formerly Rule 707); Md. Dist. Ct. Rule 707. Appellant's attack presupposes that the attachment of a pen register to one's telephone line constitutes a privacy intrusion of such character as to mandate invocation of Fourth Amendment principles. Unfortunately for appellant, that question has since been otherwise decided by a divided Court of Appeals in *Smith v. State,* ____ Md. ____ (No. 98, September Term, 1977, filed July 14, 1978), wherein it was held that the installation of a pen register is *not* a search for Fourth Amendment purposes.

> "We hold that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company." *Smith v. State, supra,* Slip Op. pp. 21-22.

Hence, concluding that the order was not an extraordinary writ, but was, if anything, a search warrant (as the State acknowledges), we are constrained to hold that its sufficiency and validity are immaterial; it was simply never required.

- the wiretap affidavit -

Appellant's next three arguments relate to the sufficiency of the affidavit in support of the application for a wiretap order. Presumably conceding that the information gleaned via the pen register provided a sufficient factual basis for a finding of probable cause, appellant attacks the affidavit on grounds of non-compliance with statutory requisites and improper inclusion of illegally obtained and false information.

The statutory violations of which appellant complains involve §10-403 (c) of Md. Code, Cts. Art., which provides:

> "The applicant must state whether any prior application has been made to obtain telephonic and telegraphic communications on the same instrument or for the same person and if a prior application exists the applicant shall disclose its current status.",

and a federal statutory provision, 18 U.S.C. 2518 (1) (e), which declares that:

> "Each application for an order authorizing or approving the interception of a wire or oral communication shall . . . include . . .
>
> a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application . . . ."

Appellant's first argument is that the State's Attorney incorrectly stated in the application for the wiretap order that no prior application involving the appellant had been made to the court. Appellant maintains that a prior application involving him was in fact made, and that this information was improperly withheld from the issuing magistrate in violation of both the State and Federal laws. The application to which appellant refers was for a wiretap order involving several apartment telephones in Washington, D.C. There is no indication that the subject telephones were listed in appellant's name, or that appellant owned or rented the target premises; the record does not reflect that appellant's name was to be found anywhere in

the supporting documents of that application. However, appellant insists that because information acquired pursuant to the wiretap (which was authorized upon presentation of the application to a judicial officer) ultimately resulted in his arrest, the application for the wiretap order "involved" him. We decline to recognize so attenuated a connection. The statutes are clearly aimed at preventing endless successive attempts to obtain evidence through telephonic interceptions that are geneally unproductive and potentially harassing. An individual who has not been victimized by such overly zealous investigative techniques, but has only been incidentally related to one who might have been, cannot claim the statute's protection. Appellant's contention that the affidavit in support of the application for a wiretap order did not contain a complete statement of previous wiretaps involving the same persons, places or instruments, is therefore without merit. See *United States v. Kilgore,* 518 F.2d 496.

Appellant's next contention is founded on Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The alleged violation consists of the State's failure to include in its application for permission to wiretap

> ". . . a full and complete statement as to whether or not other investigative procedures have been tried and failed or *why they reasonably appear to be unlikely to succeed if tried* or to be too dangerous . . . ." (emphasis added). 18 U.S.C. 2518 (1)(c).

This provision does not, as appellant suggests, require an "exhaustive review of other investigative techniques". *Trovinger v. State,* 34 Md. App. 357, 361. Rather, it is designed to insure that judges and magistrates are fully cognizant of the underlying facts and circumstantial difficulties in the case, so that wiretap orders will not be

routinely authorized even where probable cause exists. *United States v. Lanza*, 356 F. Supp. 27 (M.D. Fla.). The standard is one of reasonableness. Significantly, the statutory requirements are phrased as alternative measures, being separated by the conjunction "or". The unavoidable explanation is that Congress did not intend for law enforcement officers to undertake all manner of investigation when such efforts would in all likelihood constitute a mere exercise in futility or an unreasonably dangerous venture.

Presumably, of course, before an officer can detail his reasons for not pursuing "other investigative procedures", he must outline those that have been unsuccessfully attempted up until that time. Appellant has referred us to *Haina and Strawbridge v. State*, 30 Md. App. 295, as providing a good example of what methods should have been employed by the investigators and attested to in their affidavit. Accepting for the moment appellant's interpretation of *Haina* as a prototypal formula for affidavits in such circumstances, we find that of the nine investigative techniques detailed in that case, three are inapplicable to the instant case because they dealt strictly with the appropriate utilization of a confidential informant — a question not arising during the course of this investigation, due to the absence of such an aide. The other six techniques were listed as:

(a) investigation of criminal backgrounds;
(b) mobile surveillance of an automobile;
(c) fixed surveillance of a residence;
(d) pen registers;
(e) direct contact with the subject; and
(f) search warrants.

The affidavit in support of the application clearly illustrates that the first four of these methods were in fact employed by the investigating team. The failure to initiate direct contact with the subject was adequately explained away as an investigative procedure which "reasonably appear[ed] to be unlikely to succeed if tried . . ." because:

> ". . . a person conducting an illegal lottery operation or bookmaking operation by telephones knows the people who are betting with him by their voice and your affiant has in the past attempted to place bets with people that are operating illegal lottery and bookmaking operations over the telephones and these people would not accept lottery or horse wagers from your affiant. Your affiant feels that the same would pertain to Donald Lee Dawson. That if your affiant were to call telephone number 577-0631 or 577-0699 that the person that answered the telephone would not accept a lottery or horse wager from your affiant and would not talk to your affiant in reference to his lottery or bookmaking operation because this person does not know your affiant or your affiant's voice and would not trust your affiant."

Finally, we cannot conceive of how a search warrant would have uncovered the evidentiary materials sought in this case. Where the nucleus of the offense consists of conversations, and the only means of proof lies in securing those conversations, it is not unreasonable for the police to attempt to acquire that telephonic evidence prior to obtaining whatever tangible evidence might exist. Were we to require that a search warrant be executed before any wiretap could be authorized, we would in effect be denying law enforcement any opportunity whatsoever to accumulate intangible telephonic evidence, for once the search warrant was executed, the telephone conversations would cease.

Furthermore, where, as here, a conspiracy is alleged, any attempt to obtain the names of the co-conspirators would be thwarted by obligating the police to arrest one confederate immediately upon a finding of probable cause as to him. See *Haina and Strawbridge v. State, supra,* at 312-313.

In his next argument concerning references in the affidavit to illegally obtained evidence, appellant recites two instances in which suppressed evidence was allegedly used to support a determination of probable cause. Both factual assertions in the affidavit were apparently made for the purpose of demonstrating that certain telephone numbers appearing with some frequency on the pen register printout were somehow connected with persons suspected of gambling violations or with residences used for such operations. Specifically, appellant contends:

> "The affidavit stated at Paragraph 33[1] that the defendant had been arrested and searched on February

[1]Paragraph 33.

"One of the telephone numbers recorded was 649-3708. This telephone number was recorded 6 times on May 3, 1975, 6 times on May 5, 1975 and 5 times on May 6, 1975. The telephone number is listed to Saul Jaffe at 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland. Your affiant checked with Sergeant Whalen of the Montgomery County Police Department concerning Saul Jaffe. Sergeant Whalen related to your affiant that Saul Jaffe was arrested by the members of the Federal Bureau of Investigation as a result of a raid which was conducted on 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland on February 1, 1973 for violations of the Federal Gambling Laws. Sergeant Whalen further related that he was a member of the raid team on February 1, 1973 and while inside 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland he personally accepted lottery wagers over the telephone while inside that address. Also that on January 28, 1975 the Montgomery County Police Department received a complaint that an illegal numbers operation is being conducted at 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland over telephone number

(continued)

> 1, 1973, as a result of a gambling investigation involving Joseph Bellosi in the District of Columbia. However, all evidence and derivitive [sic] evidence from that wiretap was subsequently suppressed. *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir. 1974).
>
> Paragraph 34[2] contained information which stated that the Appellant's telephone number was found pursuant to the execution of a search warrant involving another gambling investigation of one Norman James Smith. However, all evidence and derivitive [sic] evidence involving Mr. Smith was suppressed . . . ."

(footnote continued from preceding page)

649-3708. On February 12, 1975 Sergeant Whalen stated that he had contacted the Federal Bureau of Investigation concerning the Saul Jaffe case. Sergeant Whalen learned that Saul Jaffe had passed away and that the charges were dismissed on October 7, 1974. On February 10, 1975 Sergeant Whalen related that he had personally received information from an unknown male that Saul Jaffe's operation had been taken over by Mrs. Jaffe and that the operation was still being conducted at 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland over telephone number 649-3708. Again on May 5, 1975 Sergeant Whalen received another call from the unknown male who stated that Mrs. Jaffe was still operating the illegal gambling operation at 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland over telephone number 649-3708."

[2]Paragraph 34.

"Another of the telephone numbers recorded was 627-3916. This telephone number was recorded three times on May 5, 1975. The telephone number is listed to Donald H. Dornisch at 13808 Townfarm Road, Upper Marlboro, Prince George's County, Maryland. Your affiant checked the files of the Prince George's County Police Department, Vice Control Section concerning Donald H. Dornisch. Your affiant learned that on September 12, 1972 there was a complaint concerning Melba Dornisch as being involved in an illegal lottery operation. Your affiant also learned that the telephone number 627-3916 was found on a telephone list of numbers writers for Gerald LeCompte which was seized on October 7, 1974. The name beside the telephone number is Melba."

Edited to its relevant portions, Paragraph 33 of the affidavit states:

> ". . . Saul Jaffe was arrested by the members of the Federal Bureau of Investigation as a result of a raid which was conducted on 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland on February 1, 1973 for violations of the Federal Gambling Laws. Sergeant Whalen further related that he was a member of the raid team on February 1, 1973 and while inside 11107 Nicholas Drive, Silver Spring, Montgomery County, Maryland he personally accepted lottery wagers over the telephone while inside that address."

We are given to understand, from comments made by the prosecutor at the suppression hearing in the court below, that the arrest of Mr. Jaffe and the search of his home were conducted pursuant to invalid warrants (the warrants being rejected as fruits of the previously issued and quashed "Bellosi wiretap" order). Although the State conceded at the hearing on the motion that this contaminated the wiretap order with a "small primary taint", we are unable to see how appellant's Fourth Amendment rights were in any way violated by the wrongful actions of law enforcement officers in either the Bellosi case or the Jaffe investigation.

> ". . . Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174.

Therefore, we find that:

> ". . . it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the [appellant]: (a) [was] not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States,* 411 U.S. 223, 229.

There is, we note, some indication that appellant was arrested at *his* home on the day of this raid. In its brief, the State mentions that "[t]he prosecution conceded that references were made in the affidavit in support of the application for the wiretap to Appellant's February 1, 1973 arrest . . . .", then footnotes this statement with the assertion that "Paragraph 33 does not in fact refer to Appellant's February 1, 1973 arrest." We concur with the State's footnoted rendition of Paragraph 33's contents, but add that the State made no such concession at the motions hearing. The prosecutor simply stated that "*a* defendant . . . was arrested and searched" as a result of the illegal wiretap. Moreover, the appellant himself does not aver in his brief that he was involved in that incident. Under these circumstances, we decline to assume, as the State has, that appellant has standing.

With regard to the allegations surrounding Paragraph 34, we are simply confounded by appellant's summarization of its contents. There is absolutely nothing in that paragraph — or anywhere else in the affidavit — to indicate that appellant's telephone number was discovered in the course of *any* investigation, much less the one alluded to. Notwithstanding the State's affirmance of appellant's factual recitation, we cannot reasonably conclude that facts wholly absent from the affidavit tinged the consequent wiretap order with illegality; nor can we speculate, without some adequate factual basis, that the issuing magistrate considered such phantom facts in making his determination of probable cause.

Finally, we can shortly dispose of appellant's complaint of the inclusion of "reckless misrepresentations of facts" in the affidavit. He urges us to declare that a statement in the affidavit asserting that appellant was seen on one occasion purchasing a Daily Racing Form at the KC Drug Store in New Carrollton, Maryland, was patently untrue on the basis of the testimony of a drugstore employee, who related that appellant habitually bought a Wall Street Journal at the store, and that she herself had never seen him purchase a Daily Racing Form. It is well settled that factual inaccuracies do not automatically destroy probable cause or otherwise render an affidavit invalid. See *Rugendorf v. United States,* 376 U.S. 528, 532; *Carter v. State,* 274 Md. 411, 439; Anno., 5 A.L.R.2d 394. Moreover, the fact that one store employee never saw appellant purchase a Daily Racing Form certainly does not incontrovertably establish that he never did so.

- minimization -

Ironically, appellant's final argument with regard to the wiretap is that because the police department did not record *enough* irrelevant conversations, the reviewing judge could not determine whether it intercepted too many.

The interception of telephonic communications is, of course, a serious intrusion into a person's private life, and there is undoubtedly always some danger that those monitoring the conversations will overextend the intrusion into personal matters, unrelated to the purposes of law enforcement. It is for this reason that the policy of minimization has been legislatively mandated. 18 U.S.C. 2518 (5). Unfortunately, the nature of the statutory beast is

such that investigating officers must of necessity be trusted to act in good faith, guided by reason and common sense. It would be confusing, if not contradictory, to suggest that it is inexpiable interloping to listen to personal calls, but that it is necessary to preserve on tape any such conversations, however slight, that are inadvertently overheard.

In the instant case, the record reveals that the tape recording machine was immediately activated whenever appellant's telephone was used. The monitoring officer would take note of what was being said and if the call was obviously a personal one, then — and only then — would the tape recorder be disconnected. The officer would periodically check to insure that the tone of the conversation had not changed; if it had not, the recorder would remain inactivated. It is these periodic interruptions into personal calls that appellant claims should have been taped. We find, however, that the officers acted wholly within the dictates of reason, and, absent some evidence of misconduct or bad faith, their conduct cannot be said to have transgressed the bounds of the law. The trial court properly concluded that a minimization procedure was satisfactorily followed. *Spease and Ross v. State,* 275 Md. 88.[3]

- the sentence -

Appellant's final contention is that his sentence demands modification, the judge having been prompted by

[3]The Supreme Court's recent decision in *Scott v. United States,* ____ U.S. ____, 23 CrL 3019(No. 76-6767, decided May 15, 1978), does not affect our decision here. While under the rationale of that case, the facts before us would likely similarly give rise to the conclusion that it would have been reasonable for the officers to record the conversations at issue here, the Court's opinion in no way compels the converse; *i.e.,* that it was *un*reasonable to *refrain* from recording them.

"unworthy, prejudicial motives". No objection to the court's decision was made at sentencing, nor was any action subsequently taken to induce reconsideration or review. Therefore, the question is not before us, *cf. Brooks v. Warden,* 1 Md. App. 1; *Bennett v. State,* 180 Md. 406, and even if it were, we find nothing in the record to warrant a finding of unconstitutionality.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.

DONALD LEE DAWSON

v.

STATE OF MARYLAND

In the
Court of Appeals
of Maryland

Petition Docket No. 298
September Term, 1978
(No. 1010, September Term, 1977
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 9, 1978.